No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF HEARTBEAT INTERNATIONAL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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OTHER MATERIALS

Kimberly Bender, *Former Teen Mom Pushing To Reach More Abortion-Minded Clients*, Pregnancy Help News (Mar. 9, 2016) 15

Black's Law Dictionary (6th ed. 1990) 17

California Department of Health Care Services, Research & Analytic Studies Division, *Frequency of Threshold Language Speakers in Medi-Cal Population by County for January 2015* (Sept. 2016) 22

California Department of Transportation, *Caltrans Activates Signs to Urge Drivers to Save Water* (Feb. 11, 2014) 34

Covered California, *Report by the California Health Benefit Exchange to the Governor and Legislature* (Nov. 2013) 33

Family Research Council, *A Passion To Serve* (2d ed. 2010) 10

Foothills Pregnancy Resource Center, *Lori's Story* 13, 14

Margaret H. Hartshorn, *Foot Soldiers Armed With Love* (2014) 8

Heartbeat International, *A Generation Making a World of Difference* (2016) 8, 9

Heartbeat International, *Life Trends Report* (2018) 9, 11

Jay Hobbs, *Pressured to Abort, Gibson Now Dedicated to Hometown Choice*, Pregnancy Help News (Mar. 28, 2016) 14

Jay Hobbs, *These 5 Women Left Successful Careers to Save Lives in Pregnancy Centers*, Pregnancy Help News (Dec. 19, 2017) 14

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INTEREST OF *AMICUS CURIAE*[1]

Heartbeat International, Inc. ("Heartbeat") is uniquely positioned to provide relevant factual background and legal argument in this case. Founded in 1971, Heartbeat is an IRC § 501(c)(3) non-profit, interdenominational Christian organization whose mission is to support the pro-life cause through an effective network of affiliated pregnancy help centers. Heartbeat serves approximately 2,400 pro-life centers, maternity homes, and non-profit adoption agencies in over 50 countries—making Heartbeat the world's largest such affiliate network. Heartbeat's network of affiliates includes approximately 71 pregnancy help centers in California (including Petitioner Fallbrook Pregnancy Resource Center), 33 of which provide medical services.

Heartbeat requires affiliated pregnancy centers to agree to its "Commitment of Care and Competence," which includes, *inter alia*, commitments: (i) to provide "accurate information about pregnancy, fetal development, lifestyle issues, and related concerns"; (ii) to ensure that all "advertising and communication are truthful and honest and accurately describe the services

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus Curiae* or its counsel, make a monetary contribution to the preparation or submission of this brief. Petitioners consented to the filing of this brief through a blanket consent filed with the Court on November 20, 2017. Respondents consented in e-mails from their respective counsel on December 13, 2017.

[offered]"; and (iii) not to "offer, recommend or refer for abortion or abortifacients."[2]

Heartbeat also operates a 24/7 toll-free telephone and web-based help line called Option Line, which individuals facing unintended pregnancies can contact for information and referrals to nearby pro-life centers. In 2017, Heartbeat's Option Line handled approximately 350,000 contacts, including phone calls, e-mails, instant messages, and online chats in English and Spanish. Heartbeat also operates an online news service called Pregnancy Help News. In 2016, Pregnancy Help News stories had 162,537 unique page views. Heartbeat is funded almost entirely by private contributions; it receives no public funding.

California's Reproductive FACT Act, Cal. Health & Safety Code §§ 123470–123473 (the "Act"), substantially impacts Heartbeat's California affiliates because, among other things, it compels them to speak a message not only with which they profoundly disagree, but which directly contravenes their very reason for existence. Heartbeat therefore has a direct interest in the outcome of this case. Given its network of affiliated pregnancy centers, Heartbeat is uniquely well-positioned to provide information and argument to the Court regarding how the Act untenably constricts the speech of such centers, and why the Act's requirements cannot withstand First Amendment scrutiny.

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[2] *Available at* https://www.heartbeatinternational.org/about-us/commitment-of-care.

SUMMARY OF ARGUMENT

Speech, not abortion, is the fundamental issue in this case. The speech in question in this particular case happens to concern abortion, but the First Amendment would apply in largely the same manner if the speech concerned any other controversial topic—immigration, tax policy, or LGBTQ rights, to name a few. In a speech case like this one, the question is not which side of a contested issue is right, but, rather, whether and to what extent each side shall be free to advocate its views without government putting its thumb on the scales of the debate. The Free Speech Clause's protections are at their zenith when government seeks to regulate "the expression of editorial opinion on matters of public importance," *FCC v. League of Women Voters*, 468 U.S. 364, 375 (1984)—and whatever one might think about abortion, there can be no question that it is a matter of enormous public importance.

California's Reproductive FACT Act impermissibly intervenes in the abortion debate, imposing State-mandated speech on one viewpoint, and thereby weakening the advocacy work surrounding that viewpoint. Though the Act purports to apply broadly and neutrally to a wide array of medically licensed and unlicensed facilities, in actuality, by dint of its carefully structured exemptions, it applies to essentially no one except pregnancy centers on the pro-life side of this contentious public debate. It impermissibly regulates the protected speech of such centers in at least three ways.

First, the Act requires medically licensed pro-life pregnancy centers to dilute their message with pro-abortion speech, and indeed, to engage in pro-abortion advocacy with their clients. It requires them: (i) to tell their clients that "California has public programs that provide immediate or low-cost access to ... abortion"; and (ii) to direct their clients, in *imperative language*, to "contact the county social services office" at a particular telephone number "[t]o determine whether you qualify." Cal. Health & Safety Code § 123472(a)(1). The Act's required statements are anathema to the convictions of the people who are forced to speak them—people who, as explained below, have dedicated themselves to the pro-life cause out of religious or moral conviction, and, often, based on acutely personal abortion-related life experiences. Because the Act's required statements violate the convictions of the people compelled to speak them, the Act contravenes the most basic of all First Amendment principles: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics ... or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *accord Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573 (1995) (outside the commercial speech context, government "may not compel affirmance of a belief with which the speaker disagrees").

Second, the Act chills the constitutionally protected speech of staff and volunteers of medically licensed pregnancy centers. It provides that when

such a center engages in its speech-based work, it triggers a statutory obligation to provide information and a directive that many staff and volunteers cannot provide without violating their deeply held religious beliefs or moral convictions. The Act thus places pregnancy centers' staff and volunteers, or those considering becoming such, on the horns of a dilemma: either convey a message and a directive that violate their convictions, or refrain from the underlying speech that triggers that obligation—*i.e.*, refrain from working or volunteering at a pregnancy center. The latter is the only choice for those seeking to live in accordance with their consciences. Because the Act suppresses them from speaking and advocating their pro-life convictions in their setting of choice, it runs afoul of core First Amendment principles. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 794 (1988) (striking down a fundraising regulation because the regulation's "chill and uncertainty" might discourage professional fundraisers from engaging in fundraising in the first place).

Third, the Act drowns out the message of non-medically licensed pregnancy centers in a sea of burdensome, expensive, and unnecessary disclosures. The statute requires them literally to meet their clients at the door with a warning that the center is "not licensed as a medical facility by the State of California and has no licensed medical provider"—a not-so-subtle way of saying, "You should go somewhere else." Cal. Health & Safety Code § 123472(b)(1). The statute requires the same disclosure to appear in any advertising in as many as 13 different languages. Under the Act, if a center

wanted to take out a simple seven-word advertisement, or even place a notice in a local church bulletin, it could have to bury its chosen message in *hundreds* of additional words calculated to *discourage* people from responding to the advertisement or notice. And the Act requires the centers to foot the bill for these exponentially larger advertising spots—or more accurately, anti-advertising spots—which will be cost-prohibitive for these non-profit organizations offering their services free of charge. This, too, contravenes basic First Amendment principles: "[C]ompelling the publication of detailed ... information that would fill far more space than the advertisement itself[] would chill the publication of protected ... speech and would be entirely out of proportion to the State's legitimate interest in preventing potential deception." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 663–64 (1985) (Brennan, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Unquestionably, "the Act is a content-based regulation"; indeed, the Court of Appeals below so held. *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 834 (9th Cir. 2016). "A law that is content based on its face is subject to strict scrutiny." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). The Act also is viewpoint-based, in that its exemptions are gerrymandered such that the Act targets *only* pregnancy centers on the pro-life side of the abortion debate; indeed, the drafter of the bill, in describing its purpose, pejoratively called the very existence of such centers "unfortunate[]." (Joint Appendix ("J.A.") at 39.) And when some California

legislators subsequently proposed a reciprocal bill that would have required abortion providers to post information about life-affirming resources (including Heartbeat's Option Line telephone number), their bill failed even to make it out of committee.[3] The statute is subject to strict scrutiny for this reason as well: "The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys ... ." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (internal quotation marks and citation omitted).

The Act cannot satisfy strict scrutiny, or for that matter, even intermediate scrutiny. There is insufficient evidence that pregnant women in California are unaware of their range of reproductive options or of the availability of state funding, or that they are confused about the type of facility they are visiting. Nor are the Act's means of accomplishing the State's stated objectives sufficiently tailored. The State can disseminate its desired message about abortion and abortion resources through any number of means. For example, it can take out a billboard campaign, require disclosures in sex education classes in public schools, and make information available on the internet. What the State may *not* do, particularly given the availability of these other options, is impress free citizens into its service, and force them to mouth words with which they profoundly disagree.

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[3] *See* https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2775.

The Act's requirements are unconstitutional, and the decision below should be reversed.

ARGUMENT

Because the constitutional question presented is informed by the context in which it arises, Heartbeat describes below (i) the work of pregnancy centers; (ii) typical characteristics of the men and women who work or volunteer there; and (iii) the specific ways in which the Act commandeers their speech. Heartbeat then explains why, in light of those background facts, the Act's requirements cannot survive First Amendment scrutiny.

I. THE WORK OF PREGNANCY CENTERS

Pregnancy centers rightly could be called the service arm of the pro-life movement. When laws banning abortion began to loosen in the 1960s, pro-life activists responded by organizing "alternatives-to-abortion" services. *See* Heartbeat International, *A Generation Making a World of Difference*, at 3 (2016) [hereinafter *World of Difference*].[4] The Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), galvanized the movement and spurred further organization. Eager to help women in the midst of unexpected or difficult pregnancies, pro-life individuals in the infancy of the movement took pregnant women into their own homes, started hotlines for women in crisis, and organized local centers to respond to the needs of women in their own communities. *See* Margaret H. Hartshorn, *Foot*

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[4] *Available at* https://www.heartbeatinternational.org/pdf/HeartbeatHistoryBrochure.pdf.

Soldiers Armed With Love 13, 19 (2014). The pregnancy help community began as, and continues to be, a grassroots movement designed to ensure that no woman ever feels forced to choose abortion because of lack of support or practical alternatives.

As pregnancy centers sprang up around the nation, they recognized a need for operational standards, training resources, networking, a directory of pregnancy help organizations, and a hotline to connect women with such organizations. To satisfy this need, several individuals founded Alternatives to Abortion Incorporated (later renamed Heartbeat International, Inc.), a federation of independently governed, locally funded community pregnancy centers, including maternity homes, pregnancy resource centers, pregnancy medical centers, and non-profit adoption agencies. *See World of Difference* at 11–12.

Today, there are some 2,750 pregnancy centers in the United States that collectively serve roughly 1.5 million clients per year. *See* Heartbeat International, *Life Trends Report* at 2–3 (2018).[5] These include nearly 200 centers in California, approximately 71 of which are Heartbeat affiliates. The California centers divide into two categories of relevance to this case.

First, some centers (including approximately 33 Heartbeat affiliates) are medical facilities licensed under § 1204 or another provision of the California Health and Safety Code. These centers have licensed

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[5] *Available at* https://www.heartbeatinternational.org/pdf/ltr2018.pdf.

medical personnel who provide various medical services, such as medical-grade pregnancy testing, ultrasounds to confirm a viable pregnancy and to rule out a dangerous ectopic pregnancy, sexually transmitted disease testing, and/or prenatal care. *See* Family Research Council, *A Passion To Serve* 6–11 (2d ed. 2010).[6] Licensed centers typically also provide an array of non-medical services, such as pregnancy options information, referrals to adoption agencies, adoption support, parenting and childbirth classes, fatherhood programs, post-abortion support groups, and material assistance such as diapers, clothes, baby formula, and car seats. *See id.* at 20–21.

Second, other California centers (including approximately 38 Heartbeat affiliates) are not licensed medical facilities and are legally precluded from providing medical services. *See* Cal. Bus. & Prof. Code § 2052. Accordingly, they necessarily confine their activities to the sort of non-medical services described above (options information, referrals to adoption agencies, etc.). *See* Family Research Council, *supra*, at 20–21. Although they may make pregnancy test kits available, the clients administer the tests themselves. *See* Heartbeat International, *Are We a Medical Clinic?*[7] These facts refute the California Legislature's finding that the Act's requirements applicable to unlicensed centers are necessary so that "pregnant women in California

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[6] *Available at* http://downloads.frc.org/EF/EF12A47.pdf.

[7] *Available at* https://www.heartbeatservices.org/are-we-a-medical-clinic.

know when they are getting *medical care* from licensed professionals." (J.A. 71 (emphasis added).)

Pregnancy centers, medically licensed or not, are non-profits and provide all or a vast majority of their services free of charge. They overwhelmingly are faith-based and, in California, typically operate as public benefit corporations for a religious purpose pursuant to California's Nonprofit Public Benefit Corporation Law, Cal. Corp. Code §§ 5110–6910. They seek to advance the pro-life cause out of religious and moral conviction; religious perspectives on life and compassion call the faithful to help those facing decisions that have profound consequences. They are funded almost entirely by private donations from pro-life individuals who want to help provide practical alternatives to abortion. A center's annual budget averages $282,000. *See* Heartbeat International, *Life Trends Report* at 4 (2018).[8]

Most pregnancy centers have a small paid staff. The majority of their executive directors hold at least a bachelor's degree, and nearly one-quarter hold a graduate degree. *See id.* at 3. Because pregnancy centers have limited funds and small staffs, they rely heavily on volunteers looking for practical ways to live out their pro-life convictions. In 2017, some 81,360 women and men volunteered in centers around the nation—contributing 6.5 million volunteer hours. *See id.* at 4.

The pregnancy help community is guided by a core set of ethical principles in their operations—

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[8] *Available at* https://www.heartbeatinternational.org/pdf/ltr2018.pdf.

from the content of their advertising, to the accuracy of the information they provide to clients, to the nature of the options they recommend. Heartbeat's affiliates, for example, must agree to its written "Commitment of Care and Competence,"[9] which includes commitments:

- To provide "advertising and communication [which] are truthful and honest and accurately describe the services [offered]";
- To provide "accurate information about pregnancy, fetal development, lifestyle issues, and related concerns"; and
- To refrain from "offer[ing], recommend[ing] or refer[ring] for abortion or abortifacients."

These commitments belie the criticisms sometimes leveled at pregnancy centers that they mislead women to prevent them from choosing abortion. Pregnancy centers, and certainly Heartbeat's affiliates, invariably strive to provide accurate information about *all* options, while refraining from encouraging abortion, and instead educating, equipping, and empowering their clients to choose life.

In summary, for more than five decades, tens of thousands of volunteers, staff, professionals, and donors with deeply held religious or moral

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[9] *Available at* https://www.heartbeatinternational.org/about-us/commitment-of-care.

convictions have come together as a caring and supportive pregnancy help community. They seek to be a safety net for women and men experiencing unexpected or challenging pregnancies, and to help them make life-affirming choices. To the members of the pregnancy help community, the notion that the State of California is forcing them to speak a pro-abortion message, or to drown out their pro-life message with mandated disclosures designed to deter their clients from seeking their help, is profoundly objectionable.

II. THE STAFF AND VOLUNTEERS OF PREGNANCY CENTERS

To appreciate why members of the pregnancy help community find it so objectionable, it is important to understand the convictions of the people who work and volunteer at the centers. Although broad generalizations besides "pro-life" are impossible, many staff and volunteers are motivated by more than just an abstract religious belief or an academic moral code. Rather, they have had acutely personal life experiences that impel them to live out their pro-life convictions and never to encourage or facilitate abortion.

Lori Berg, for example, had an abortion when she was 19. *See* Foothills Pregnancy Resource Ctr., *Lori's Story* [hereinafter *Lori's Story*].[10] She told "[l]ess than a handful of people." *Id.* She went on to a successful career as a producer, on-air host, and reporter for National Public Radio, and was named a

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[10] *Available at* http://www.foothillsprc.org/LorisStroy.pdf.

"Woman of the Year" by the Los Angeles County Commission for Women. *See* Jay Hobbs, *These 5 Women Left Successful Careers to Save Lives in Pregnancy Centers*, Pregnancy Help News (Dec. 19, 2017).[11] She described herself, however, as "[u]nknowingly ... repress[ing] a hurt and shame." *Lori's Story*. She eventually reached out to Foothills Pregnancy Resource Center in Duarte, California because "[p]ost-abortion support was one of the free and confidential services [it] provided." *Id.* Lori relished the help she received, retired from journalism, and today lives out her pro-life convictions by serving as executive director of that center.

Kathy Gibson was a 17-year-old pastor's daughter in small town Oklahoma when she found herself unexpectedly pregnant. *See* Jay Hobbs, *Pressured to Abort, Gibson Now Dedicated to Hometown Choice*, Pregnancy Help News (Mar. 28, 2016).[12] Kathy feared that her father would lose his job if her pregnancy were revealed. Feeling ashamed and alone, and tremendous pressure to abort, she did so. Now, Kathy is the executive director of First Choice Pregnancy Center in Weatherford, Oklahoma. She considers it her mission to ensure that no woman in her hometown ever feels so alone that she feels compelled to turn to abortion. *See id.*

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[11] *Available at* https://pregnancyhelpnews.com/these-5-women-left-successful-careers-to-save-lives-in-pregnancy-centers.

[12] *Available at* https://pregnancyhelpnews.com/pressured-to-abort-gibson-now-dedicated-to-hometown-choice.

Valerie Millsapps also experienced a teenage pregnancy that motivates her work as the executive director of Pregnancy Resource Center of Blount County, Tennessee. *See* Kimberly Bender, *Former Teen Mom Pushing To Reach More Abortion-Minded Clients*, Pregnancy Help News (Mar. 9, 2016).[13] Though she was pressured by her baby's father to abort, Valerie chose to raise her daughter. Valerie remarked: "When I got to see her face, it was all worth it. But it was hard. If there had been [a] pregnancy center, it could have helped me through the struggles." *Id.* Her message for the women who come to her center is clear: "You don't have to be in this alone." *Id.*

Latasha Thomas began volunteering with New Life Crisis Pregnancy Center in Leesville, Louisiana in 2007. *See* Rachel Leigh, *Her Life Is a Gift—See How This RN Gives Back*, Pregnancy Help News (Mar. 21, 2016).[14] Her pro-life convictions come, in part, from knowing that both she and her husband were almost aborted. After she completed her associate degree in 2010 and became a registered nurse, she became the center's executive director. Latasha is focused on a mission: "[I]f you only talked to one woman and her life was changed, it's worth it all." *Id.*

These individuals are among the tens of thousands who work or volunteer at pregnancy

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[13] *Available at* https://pregnancyhelpnews.com/former-teen-mom-pushing-to-reach-more-abortion-minded-clients.

[14] *Available at* https://pregnancyhelpnews.com/her-life-is-a-gift-see-how-this-rn-gives-back.

centers based on their passionate devotion to the pro-life cause. They clearly have decided which side of the issue they are on: Rightly or wrongly, they believe that abortion is "nothing short of an act of violence against innocent human life." *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992). They have dedicated themselves to speaking their pro-life message and living out their convictions by doing what they believe is preserving life and helping women in need. Yet they are the very individuals compelled by the Act to speak the State's pro-abortion message.

III. THE ACT'S IMPACT ON SPEECH

A. The Act Compels Medically Licensed Pregnancy Centers To Speak Words With Which They Profoundly Disagree

The Act compels medically licensed pregnancy centers to say two related things to their clients, both of which are antithetical to the convictions, mission, and reason for existence of such centers. First, the statute requires them to advertise that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women." Cal. Health & Safety Code § 123472(a)(1). Second, the statute compels the centers to give the following directive—not a disclosure of fact, but an affirmative urging in imperative language: "To determine whether you qualify, *contact the county social services office* at

[insert the telephone number]." *Id.* (brackets in original; emphasis added).

The disclosure about the availability of state funding, even standing alone, facilitates abortion and therefore is not a disclosure a pro-life center or its staff and volunteers can make in good conscience. Facts are advertised for a reason, and in this case, the reason can be none other than to encourage women and men facing unintended pregnancies to consider, or more seriously consider, abortion, and to facilitate their access to abortion funding. Whether the advertisement is factual does not change its perniciousness from the perspective of a pro-life speaker; the "general rule[] that the speaker has the right to tailor the speech[] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573; *accord Riley*, 487 U.S. at 797–98 ("[C]ases [striking down laws compelling speech] cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech.").

Further, the directive to "contact the county social services office" is not a disclosure of fact. It is outright advocacy—*i.e.*, "'[t]he act of pleading for, supporting, or recommending,'" or an "urging to action." *Gitlow v. New York*, 268 U.S. 652, 665 (1925) (quoting Century Dictionary); *see also* Black's L. Dictionary 55 (6th ed. 1990). Specifically, it is pro-abortion advocacy, perversely extracted from pro-life speakers. *See Wooley v. Maynard*, 430 U.S. 705, 713

(1977) (government may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."); *id.* at 715 ("The First Amendment protects the right of individuals ... to refuse to foster ... an idea they find morally objectionable."). The directive specifically urges the clients to take an action that is designed to carry them down the road to an abortion. Indeed, it is very close to a referral for abortion—something that is unthinkable to a pro-life pregnancy center. As noted above, Heartbeat's affiliates expressly pledge not to "offer, recommend or refer for abortion or abortifacients."

Moreover, the Act requires the centers to speak these words at the very outset of the client relationship (sometimes even before the formation of the relationship), ensuring that the centers direct their clients and prospective clients to abortion resources *before* the centers can speak their message of hope, support, and encouragement for a woman to choose life. Specifically, the statute requires the centers to make the disclosure and to provide the directive in a "public notice posted in a conspicuous place where individuals wait," in a "printed notice distributed to all clients," or in a "digital notice ... that can be read at the time of check-in or arrival." Cal. Health & Safety Code § 123472(a)(2). The statute thus requires the centers to speak the government's message first, before communicating their own.

The Act commandeers not only the message, but also the "voice," of the centers' speech, in that the disclosure and directive are not even attributed to the State. The mandated language is written as if the center itself is the one that chose to advertise the availability of abortion resources. The Act thus compels pro-life centers to adopt *as their own words* the State's pro-abortion message—notwithstanding that "the choice of a speaker not to propound a particular point of view ... is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575.

If a client acts on the required information and directive, and as a result, has an abortion that she otherwise would not have had, the pro-life pregnancy center would have encouraged and facilitated an abortion. Indeed, it would be a "but for" cause of the abortion. For a pregnancy center devoted to the pro-life cause, it is difficult to imagine anything more morally repugnant.

B. The Act Chills Constitutionally Protected Speech Of Medically Licensed Pregnancy Centers' Staff And Volunteers

The Act also chills speech that the First Amendment protects. It defines a "licensed covered facility" to which it applies, in part, as a medically licensed facility that "offers counseling about[] contraception or contraceptive methods" and "offers to provide ... pregnancy options counseling." Cal. Health & Safety Code § 123471(a). The statute thus makes constitutionally protected speech a trigger for the requirements of further, pro-abortion speech.

As discussed, this further, compelled speech violates the deeply held religious beliefs and/or moral convictions of the staff and volunteers of pro-life centers. Consequently, many staff and volunteers will find themselves unable to engage in the mandated speech without violating their consciences. They have only one way out of this conundrum besides outright disobedience to the law: do not engage in the antecedent speech in the first place, *i.e.*, do not work or volunteer at a medically licensed pregnancy center.

This is not mere speculation. In a survey of 2,865 faith-based medical professionals, fully 91% said they would rather stop practicing medicine than have to violate their convictions. Specifically, 77% of respondents reported they "strongly agree," and an additional 14% said they "somewhat agree," with the statement, "I would rather stop practicing medicine altogether than be forced to violate my conscience." Mem. to Office of Public Health and Science, Dept. of Health and Human Servs. from Christian Med. Ass'n, at 5 (Apr. 2009).[15]

It is, of course, impossible to know how many staff and volunteers of California pregnancy centers will resign if the Act's requirements are upheld, or how many people who otherwise *would* have worked or volunteered at a center will refrain from doing so. That is inherent in the chilling of speech; the effects often are unmeasurable because it is hard to measure something that does *not* happen. But if

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[15] *Available at* https://www.cmda.org/library/doclib/cma-survey-analysis-for-hhs.pdf.

91% of faith-based physicians and other medical professionals would rather sacrifice their livelihoods than violate their consciences, it stands to reason that actual or prospective staff and volunteers of non-profit pregnancy centers offering services for free likewise would choose to do something different with their time. They work and volunteer at pregnancy centers for the *very purpose* of living out their pro-life convictions; if trying to do so requires them to convey the State's pro-abortion message, the choice for many will be clear. *See Riley*, 487 U.S. at 794 (striking down a statute that created "chill and uncertainty [that] might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising ... , all of which will ultimately reduce the quantity of expression") (internal quotation marks, brackets, and citation omitted); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (striking down a statute that compelled speech upon the occurrence of antecedent speech; the targets of the statute "might well conclude that the safe course is to avoid controversy").

C. The Act Fundamentally Alters—Indeed, Outright Precludes—Constitutionally Protected Speech Of Non-Medically Licensed Pregnancy Centers

Because the Act "[m]andate[s] speech that" pregnancy centers "would not otherwise make," it "necessarily alters the content of the[ir] speech." *Riley*, 487 U.S. at 795. This is true not only for medically licensed centers as discussed above, but for

non-medically licensed centers as well. Indeed, the statute alters the constitutionally protected advertising of unlicensed centers so dramatically that it effectively precludes many of them from advertising at all.

The statute requires unlicensed centers to state that they are unlicensed in 48-point type "in the entrance of the facility and at least one additional area where clients wait to receive services." Cal. Health & Safety Code § 123472(b)(2). It requires the same disclosure in "any print and digital advertising materials." *Id.* § 123472(b). It requires these disclosures in both English and "the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." *Id.* Those additional languages range from one to 12 depending on the county; in Los Angeles County, the most populous, the additional languages are Spanish, Arabic, Armenian, Cambodian, Cantonese, Farsi, Korean, Mandarin, Russian, Tagalog, Vietnamese, and something the State vaguely calls "Other Chinese." Cal. Dept. of Health Care Servs., Research & Analytic Studies Division, *Frequency of Threshold Language Speakers in Medi-Cal Population by County for January 2015*, at 4–5 (Sept. 2016).[16] Further, the statute requires that in any advertising, the disclosures be "in larger point type than the surrounding text"; "of the same size" type if in a "contrasting type, font, or color"; or "set off from the surrounding text of the same size by

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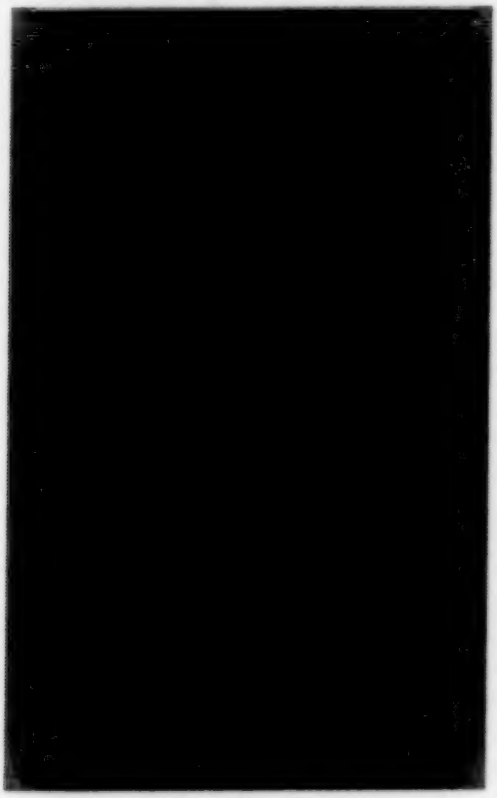
[16] *Available at* http://www.dhcs.ca.gov/dataandstats/statistics/documents/threshold_language_brief_sept2016_ada.pdf.

symbols or other marks to call attention to the language." Cal. Health & Safety Code § 123472(b).

The required signage at the entrance to the facility is a not-so-subtle way of saying, "Are you sure you want to come here? Maybe you'd be better off going somewhere else." It inherently tends to drive clients away—potentially before they even step through the door. If they do proceed into the office, they then are encouraged to leave as they stare at the additional sign in the waiting room while waiting for their appointments. *Cf. Riley*, 487 U.S. at 800 (disclosure requirement for fundraisers violated First Amendment where "if the potential donor is unhappy with the [disclosed fact], the fundraiser will not likely be given a chance to explain [it]; the disclosure will be the last words spoken as the donor closes the door"). The statute thus tends to prevent the centers from speaking their life-affirming message to clients *at all*. At a minimum, it will change the nature of any ensuing conversation, thus "necessarily alter[ing] the content of the [centers'] speech." *Id.* at 795.

The related advertising disclosures, moreover, are at least as draconian as the disclosures in *Riley* because they drown out the advertisement they are meant to accompany. To illustrate, a simple advertisement in Los Angeles County looking like this:

would have to mushroom into something like *this* to comply with the statute:



The Act thus buries an advertisement intended to encourage people to contact the center with lengthy discursives on why they should think twice before doing so. The statute therefore alters the content of the centers' advertising, which is itself constitutionally protected speech. And it does so in a way that will deter prospective clients from contacting the centers, thus chilling the centers' ability to speak their pro-life message to their clients. Further, because the statute requires an

otherwise short advertisement to effectively become a message *against* contacting the center (especially in counties where the disclosure must appear in several languages), the statute effectively precludes such advertising altogether; no center is going to pay to advertise against itself.

Additionally, even if advertising somehow remained desirable after the Act, it would be cost-prohibitive for most, if not all, centers. The short advertisement above would cost a mere $299 for a 28-day run in January 2018 in the "service directory" portion of the Los Angeles Times' classified section.[17] The long version complying with the Act would cost exponentially more—$9,058. And that is for a mere classified advertisement; most other forms of advertising cost substantially greater amounts. Advertising that complies with the Act simply will be out of reach for most pregnancy centers. *Cf. Miami Herald*, 418 U.S. at 257 ("[I]t is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate [the government's speech requirement]."). The absurdity of the disclosure and its chilling effect on speech are further exemplified by considering, for example, the inclusion of such a disclosure on the back of a local church bulletin.

The Act thus illustrates precisely what Justice Brennan wrote in one of the Court's seminal speech cases: "[C]ompelling the publication of detailed ...

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[17] The prices can be generated by inputting the information at https://placeanad.latimes.com/classified-service-directory-listing.

information that would fill far more space than the advertisement itself[] would chill the publication of protected ... speech and would be entirely out of proportion to the State's legitimate interest in preventing potential deception." *Zauderer*, 471 U.S. at 663–64 (Brennan, J., concurring in part, concurring in the judgment in part, and dissenting in part).

IV. THE ACT IS UNCONSTITUTIONAL

A. The Act Is Subject To Strict Scrutiny

1. The Act Is Content-Based

Because the Act requires pregnancy centers to engage in speech on a particular subject matter via the required notices, it is a content-based regulation—as the Court of Appeals below held. *See Reed*, 135 S. Ct. at 2227; *NIFLA*, 839 F.3d at 834. As such, it is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226; *see also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."). This is so even if, unlike here, "the government[] [has a] benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, 135 S. Ct. at 2228 (internal quotation marks and citation omitted).

Although this Court occasionally has subjected content-based regulations to a lesser level of scrutiny, it has done so only with "certain well-defined and narrowly limited classes of speech." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which ... are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*; *see also United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion) (acknowledging that content-based restrictions on speech have been permitted "only when confined to the few historical and traditional categories of expression long familiar to the bar") (internal quotation marks omitted). Plainly, no such category is presented here, and the Act therefore is subject to strict scrutiny.

2. The Act Is Viewpoint-Based

The Act is not just content-based, but also viewpoint-based, and subject to strict scrutiny for this reason as well. *See Sorrell*, 564 U.S. at 566. The statute's structure and history demonstrate that it was designed to impact disproportionately the speech of pregnancy centers because of their pro-life message.

Although the Act does not explicitly exclude from its scope reproductive health care providers that do not share pregnancy centers' pro-life stance, the effect of the Act's broad exemptions is precisely that. As shown in Petitioners' opening brief, the

exemptions are gerrymandered such that the Act applies to virtually no one *except* pro-life centers. (*See* Br. for Petitioners at 9–10, 13–14, 32–34, 36.) This Court long has recognized that such statutory "exemption[s] from a[] ... regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785–86 (1978)).

The Act's legislative history confirms that that is the case here. The bill's author, in explaining the "purpose of this bill," called the very existence of pro-life pregnancy centers "unfortunate," in part because they "aim to discourage and prevent women from seeking abortions." (J.A. 84–85 (capitalization omitted).) Also, in the Legislative Counsel's Digest to the Act, the Act's sponsor emphasized "a woman's right to choose or obtain an abortion" (Pet. Cert. App. at 75a), whereas earlier California laws, such as the Reproductive Privacy Act, have emphasized what they called "a woman's fundamental right to choose *to bear a child or to choose to obtain an abortion*." Cal. Health & Safety Code § 123462(c) (emphasis added). The absence of any discussion in the Act's legislative history of a woman's right to choose to bear a child underscores that the Act was calculated to increase access to abortion by burdening the very speakers who believe that abortion, though legal, is not a morally legitimate choice. *Cf. Hill v. Colorado*, 530 U.S. 703, 787 (2000) (Kennedy, J., dissenting) ("Laws punishing speech which protests the lawfulness or morality of the government's own

policy are the essence of the tyrannical power the First Amendment guards against.").

The State's animus towards pregnancy centers' pro-life message is further underscored by the fate of a bill introduced shortly after the Act passed. Some California legislators, evidently believing turnabout to be fair play, introduced a reciprocal bill (AB 2775) that would have required "facilities that offer abortion services" to disseminate to clients an onsite notice stating:

> If you are considering continuing your pregnancy, nonprofit pregnancy centers can provide services at no cost to you, that may include consultation, pregnancy testing, ultrasound services, support groups, parenting programs, material assistance, and sexually transmitted disease or sexually transmitted infection (STD/STI) testing. To find a center near you, call 1-800-712-HELP.

Report, Cal. Assembly Comm. on Health, at 1 (Apr. 19, 2016).[18] If enacted, AB 2775 would have furthered the State's *professed* purpose in passing the FACT Act—"ensur[ing] that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." (Pet. Cert. App. at 78a.) The bill died in committee, however, with opponents

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[18] *Available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB2775.

arguing that "the phone number abortion clinics would be required to post is Option Line, run by an umbrella organization for CPCs [Heartbeat], the sole purpose of which is to prevent women from accessing abortions." Report, Cal. Assembly Comm. on Health, at 5 (Apr. 19, 2016).[19] AB 2775's demise further shows that the State viewed pregnancy centers' speech as thwarting women's access to abortion, and therefore sought to dampen the persuasiveness of such speech by requiring additional government-mandated disclosures (and in the case of medically licensed centers, an affirmative directive to call a number to find out about abortion resources).

This Court's "precedents ... apply the most exacting scrutiny to regulations," like the Act, that "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). This is because such regulations "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Id.* at 641; *accord Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985) (holding that even "facially neutral" speech restrictions with "valid justifications" cannot be saved if they are "in fact based on the desire to suppress a particular point of view"). Because that is

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[19] *Available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB2775.

the case here, the Act constitutes viewpoint discrimination and is subject to strict scrutiny.[20]

B. The Act Fails Strict Scrutiny

1. The Requirements Imposed on Medically Licensed Centers Fail Strict Scrutiny

The State has attempted to justify the requirements applicable to medically licensed centers by contending that California women are "in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery," but are "unaware of the public programs" available to them. (Pet. Cert. App. at 76a–77a.) Neither the State's purported interest, nor the means chosen of achieving it, pass muster.

First, the State has provided no *evidence* that California women are in fact unaware of such matters or of the availability of state funding. This is despite the Legislature's unsupported claim that "thousands of women remain unaware of the public programs available to them." (J.A. 57.) In fact, at

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[20] Petitioners show in their opening brief that (i) as the Court of Appeals below held, *see NIFLA*, 839 F.3d at 834 n.5, the Act does not regulate commercial speech; and (ii) contrary to what the Court of Appeals held, *see id.* at 838–41, the Act also does not regulate "professional speech." (*See* Br. for Petitioners at 17, 21–22, 40–46.) Petitioners also show that, regardless, the Act is subject to strict scrutiny. (*See id.* at 41–42, 44–46).

the district court level, the State's only factual support for its purported governmental interest was the Act's legislative history, which is devoid of facts concerning the number of California women who are *actually* unaware of the public reproductive-related programs available to them. (J.A. 30–87.) The State therefore has failed to "demonstrate that the recited harms are real" or "that the regulation will in fact alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664.

Second, the requirements applicable to medically licensed centers are woefully under-inclusive for addressing the purported problem the State identifies—which "raise[s] doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (internal quotation marks omitted); *accord Reed*, 135 S. Ct. at 2232 ("[A] law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited."). For one thing, the Act's requirements do not apply to a wide variety of facilities where women go for pregnancy testing and pregnancy-related information, such as the offices of primary care physicians or obstetrician-gynecologists in private practice, student health centers, or clinics run by employers or operating as outpatient divisions of hospitals. (*See* Br. for Petitioners at 32 (analyzing the Act's exemptions).)

Moreover, although the State asserts that the Act was intended to increase awareness of public

programs relating to "contraception, health education and counseling, family planning, prenatal care, abortion, *or delivery*" (Pet. Cert. App. at 77a (emphasis added)), the mandated disclosure mentions only programs supporting "family planning services," "contraception," "prenatal care," and "abortion." Cal. Health & Safety Code § 123472(a)(1). Notably absent is any disclosure about public programs supporting child "delivery," despite the State's contention that women are also unaware of these programs. The Act's under-inclusiveness, particularly in this critical respect, underscores that the State is simply disfavoring the pro-life view, and impermissibly requiring pro-life speakers to convey a pro-abortion message.

Third, the Act's requirements are not remotely the least restrictive means of achieving the State's purported objective. The State is, of course, free to formulate its policy position on abortion and other reproductive matters. The State is also free to support its position with public programs. And the State is free to "get the word out" about such programs through any number of alternative, legitimate means besides using the walls of private pregnancy centers as the State's billboards.

For example, the State could "purchase California-based media [spots], including multi-ethnic and multi-language television, radio, print, billboard and social media [advertisements]," as it does to make people aware of health insurance options under the federal Affordable Care Act. Covered Cal., *Report by the California Health Benefit Exchange to the Governor and Legislature* at 16 (Nov.

2013).[21] The State could promote its message on freeway signs, as it does to encourage Californians to conserve water. *See* Cal. Dept. of Transp., *Caltrans Activates Signs to Urge Drivers to Save Water* (Feb. 11, 2014).[22] It could require disclosures in sex education classes offered in public schools, as it does on a wide variety of other topics. *See* Cal. Educ. Code §§ 51933, 51934. And the State could disseminate the relevant information on its own websites, which, according to a California court's post-trial Statement of Decision in a case challenging the Act under State law, the State makes essentially no effort to do. *See Scharpen Found. Inc. v. Harris*, Cal. Super. Ct. Case No. RIC1514022, slip op. (Oct. 30, 2017) (Addendum to Br. of Petitioners at 8a–9a) ("In most of the[] websites the services are merely described as 'family planning' or by a similar euphemism. The word 'abortion' appears only on 2 county websites. ... [T]he State does not require counties or other political entities to make any significant efforts to inform women of the availability of family planning services.").

The *Scharpen* court held the Act unconstitutional under the California constitution for precisely such reasons:

> The State ... may purchase television advertisements as it does to encourage Californians to sign up for Covered

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[21] *Available at* https://www.coveredca.com/PDFs/2013_leg_report.pdf.

[22] *Available at* http://www.dot.ca.gov/hq/paffairs/news/pressrel/14pr018.htm.

> California or to conserve water. It may purchase billboard space and post its message directly in front of [a pregnancy] clinic. It can address the issue in public schools as part of sex education. ... Th[e] statute compels the clinic to speak words with which it profoundly disagrees when the State has numerous alternative methods of publishing its message. In this case, however virtuous the State's ends, they do not justify the means.

Id. (Addendum to Br. of Petitioners at 19a).[23]

In short, if the State wants to get its preferred message out, it should start by actually *speaking* the message rather than mandating that others do so on its behalf. Particularly given the State's many options for doing so, it cannot constitutionally conscript private citizens on the pro-life side of the debate into its service, and compel them to advertise the State's abortion resources.

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[23] *Scharpen* was not a class action. The *Scharpen* court's injunction against the Act protects only the one plaintiff in that case. *See id.* Its injunction also applies only to "the Attorney General, the County Counsel of Riverside County, and the City Attorney of the City of Temecula," *id.*, not to the many other local authorities throughout the State that are vested with authority to enforce the Act. *See* Cal. Health & Safety Code § 123473(a).

2. The Requirements Imposed on Non-Medically Licensed Centers Fail Strict Scrutiny

The Act's disclosure requirements for unlicensed centers also fail strict scrutiny.

First, the State's stated interest—ensuring that "pregnant women in California know when they are getting medical care from licensed professionals"—is simply illogical in this context. (J.A. 71.) As noted in Part I above, centers that are not licensed as medical facilities do not—and legally cannot—provide medical care.

Second, the State has, in any event, failed to proffer any evidence that clients cannot distinguish between a lay center and a medical facility. *Cf. Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 103 (1990) (striking down a restriction on an attorney advertising his certification as a trial specialist, where there was no finding that prospective clients were likely to be confused about whether the certification constituted a government endorsement). Nor has the State proffered evidence that women are likely to be confused into thinking they are visiting a facility that offers abortions. Indeed, many California pregnancy centers have names that clearly connote their pro-life stance, such as Heartbeat's affiliates Life Choices (Poway, California), Call for Life Pregnancy Center (Hesperia, California), and Life Centers of Orange County.

Third, the required disclosure for unlicensed centers is so onerous that it effectively eliminates

their ability to advertise. As shown above, the Act's requirement that unlicensed centers disseminate the notice in English and the applicable primary threshold languages for Medi-Cal beneficiaries drowns out and increases the costs of the centers' advertising—in some counties, exponentially so. This disclosure requirement is the very essence of an "imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

Fourth, if the State is concerned that unlicensed centers somehow hold themselves out as medical facilities, it has proffered no cogent evidence of that, and it would contravene the Commitment of Care and Competence that Heartbeat requires its affiliates to adopt. *See supra*, Part I. In any event, the State has less restrictive means of stopping any such conduct, including:

- California's False Advertising Law, which prohibits "any person, firm, corporation, or association ... with intent ... to perform services ... to make or disseminate ... in any newspaper or other publication, or any advertising device, ... or in any other manner or means whatever, ... any statement, concerning ... those services ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be

untrue or misleading," Cal. Bus. & Prof. Code § 17500;

- California's Unfair Competition Law, which broadly prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *id.* § 17200; and

- California's Medical Practice Act, which makes it a crime for "any person [to] ... hold[] himself or herself out as practicing [medicine], without having at the time of so doing a valid ... certificate [to practice medicine]," *id.* § 2052(a).

See Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980) ("The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly.").

Moreover, the false advertising law and Unfair Competition Law are not limited to after-the-fact remedies, nor are any of these statutes limited to private enforcement. Rather, the false advertising law and Unfair Competition Law provide for injunctive relief, *see* Cal. Bus. & Prof. Code § 17203, and, much like the FACT Act, for enforcement "by the Attorney General or a district attorney or [in some circumstances] by a county counsel ... [or] a city attorney." *Id.* § 17204.

For these reasons and those briefed by Petitioners, the disclosure requirement for unlicensed centers cannot withstand strict scrutiny.

C. The Act Fails Even Intermediate Scrutiny

Even if the Court concludes that the Act is subject to only intermediate scrutiny, the State still has failed to meet its burden. The State still "must show at least that the [provisions] directly advance ... a substantial governmental interest and that the measure[s] [are] drawn to achieve that interest. There must be a fit between the legislature's ends and the means chosen to accomplish those ends." *Sorrell*, 564 U.S. at 572 (internal quotation marks and citation omitted). "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000).

Much of the strict scrutiny discussion above applies equally under an intermediate scrutiny analysis. In the case of medically licensed centers, this includes (i) the State's failure to show that meaningful numbers of California women are unaware of the public programs available to them; (ii) the lack of "fit" between the purported problem and the means chosen to address it, which raises the specter that the State's true, or at least primary, purpose is to stifle the pro-life viewpoint; and (iii) the plethora of other options available to the State to disseminate its message, which obviates any perceived reason for compelling pro-life speakers to

convey the State's pro-abortion message. *See supra*, Part IV.B.1. In the case of unlicensed centers, it includes (i) the fact that the State's professed purpose for requiring unlicensed centers to state that they are not medical clinics is illogical, because unlicensed centers do not provide medical care; (ii) the State's failure to show that meaningful numbers of California women are confused about the type of center they are visiting; (iii) the Act's onerous and unjustified impact on the ability of unlicensed centers to advertise; and (iv) the significant number of other, less burdensome options the State has to address any perceived problem—which demonstrates that the Act does not substantially advance an important state interest. *See supra*, Part IV.B.2.

For these reasons and those briefed by Petitioners (*see* Br. for Petitioners at 60–62), the Act fails even intermediate scrutiny.

CONCLUSION

The Act's disclosure requirements violate the Free Speech Clause of the First Amendment. The ruling below should be reversed.

Respectfully submitted,

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